In the Matter of the Amendment

of

the Hawai'i Rules of Appellate Procedure

ORDER AMENDING RULES

OF THE HAWAI'I RULES OF APPELLATE PROCEDURE
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

IT IS HEREBY ORDERED that the Hawai'i Rules of
Appellate Procedure are amended as follows (deleted material is bracketed, new material is underlined), effective January 1,
2004:

1. Rule 3 of the Hawai'i Rules of Appellate Procedure is amended as follows:

Rule 3. APPEALS--HOW TAKEN.

(a) Filing the Notice of Appeal. An appeal permitted by law from a court or agency to the Hawai'i appellate courts shall be taken by filing of a notice of appeal, together with such fees as are established by statute or these rules, with the clerk of the court within the time allowed by Rule 4. Within seven days after the filing of the notice of appeal, the clerk of the court from which the appeal is taken shall transmit a copy of the notice of appeal to the clerk of the supreme court. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, [and] which may include dismissal of the appeal.

(e) Service of the Notice of Appeal.

(1) The appellant shall serve, by mail or delivery, a file-marked copy of the notice

of appeal [by mail or delivery thereof to] on counsel of record for each other party, or, if a party is not represented by counsel, to the party at the party's last known address. Proof of service shall be filed with the court or agency promptly after the filing of the notice of appeal.

- (2) Additionally, in all actions where the court appealed from is not required to enter findings of fact and conclusions of law prior to the entry of an order, judgment, or decree, but is required to do so once a notice of appeal is filed, the appellant shall serve, by mail or delivery, a filemarked copy of the notice of appeal on the judge who entered the order, judgment, or decree, together with a file-marked copy of the request for entry of the required findings of fact and conclusions of law, as set forth in Rule 10. The clerk of the court shall include the findings of fact and conclusions of law in the record transmitted to the appellate clerk.
- (f) Payment of Fees. [Upon the filing of any separate or joint notice of appeal, the appellant shall pay to the clerk of the court appealed from such fees as are established by statute or these rules.] If the fees are not paid, the clerk of the court shall notify the appellate clerk in writing forthwith.
- 2. Subsection (c) of Rule 9 of the Hawai'i Rules of Appellate Procedure is amended as follows:

Rule 9. RELEASE IN CRIMINAL CASES PENDING APPEAL.

* * *

- (c) Criteria for Release. The decision as to release shall be made according to statute. [The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.]
- 3. Rule 10 of the Hawai'i Rules of Appellate Procedure is amended as follows:

Rule 10. THE RECORD ON APPEAL.

(a) Composition of the Record on Appeal.

The record on appeal shall consist of the following:

- (1) the original papers filed in the court or agency appealed from;
- (2) written jury instructions given, or requested and refused or modified over objection;
- (3) exhibits admitted into evidence or refused;
- (4) the transcripts [of any proceedings] prepared [pursuant to the provisions of Rule 10(b)] for the record on appeal;
- (5) in a criminal case where the sentence is being appealed, a sealed copy of the presentence investigation report; and
- (6) the indexes prepared by the clerk of the court appealed from.
 - (b) The Transcript of Proceedings.
 - (1) Request to Prepare Transcript

(E) Upon receipt of a request for a transcript, the reporter shall time stamp or otherwise acknowledge the date of receipt on the request, indicate the expected completion date on the request, and then transmit a copy of the request to the clerk of the appellate court and counsel for all parties or the parties themselves, if pro se. If the transcript cannot be completed within 45 days after the filing of the notice of appeal, the reporter shall notify counsel for all parties, or the parties themselves, if pro se, of the new date on which the transcript is expected to be completed, provided that the transcript shall be completed within 60 days after the filing of the notice of appeal, unless the reporter obtains an additional extension of time from the supreme court. Any such additional extension shall be granted upon demonstration by the court reporter that good cause for the extension exists. The court reporter shall serve a copy of the extension order upon counsel for all parties or the parties themselves, if pro se. In the event of the failure of the reporter to file the transcript within the time allowed, the supreme court may take appropriate action, including the levying of a sanction against the court reporter. Upon completion of the transcript, the reporter

shall file it with the clerk of the court from which the appeal is taken.

(F) [(E)] If, upon receiving a request for a transcript, the reporter determines that the prepaid fees or the amounts deposited by the appellant are inadequate to cover the cost of the transcript, the reporter shall, within 10 days after receiving the request, file with the clerk of the court and mail or deliver to the appellant an estimate or revised estimate of the total cost of the transcript and a notice of the additional amount required to be paid or deposited. The appellant shall pay the reporter and shall file a reporter's certificate of payment or deposit within 10 days after the mailing of the reporter's notice. The reporter shall continue to work on the transcript until the prepaid fees or initial deposit are earned or until the expiration of the time allowed to make the additional payment or deposit.

(G) [(F)] When a transcript is completed, payment of which is to be made by the clerk of the court from the appellant's deposit, the reporter shall bill the appellant at the rate authorized by the Rules Governing Court Reporting in the State of Hawai'i, with a copy to the clerk of the court, and the clerk of the court shall pay the reporter from the funds deposited and promptly refund any excess deposit to the appellant or give notice to the appellant of any additional funds needed.

* * *

(f) Request for Findings of Fact and Conclusions of Law. In all actions where the court appealed from is not required to enter findings of fact and conclusions of law prior to the entry of an order, judgment, or decree, but is required to do so once a notice of appeal is filed, the appellant shall, no later than 10 days after filing the notice of appeal, file in the court appealed from a request for entry of findings of fact and conclusions of law, naming the judge who tried the action and entered the order, judgment, or decree being appealed. The named judge shall enter the requested findings of fact and conclusions of law

within 28 days after the request has been filed. To aid the court, the court may order the parties or either of them to submit proposed findings of fact and conclusions of law after the filing of the request.

4. Rule 11 of the Hawai'i Rules of Appellate Procedure is amended as follows:

Rule 11. TRANSMISSION OF THE RECORD.

- (a) Duty of Appellant. After the filing of the notice of appeal, the appellant, or in the event more than one appeal is taken, each appellant, shall comply with the applicable provisions of Rule 10(b) and shall take any other action necessary to enable the clerk of the court to assemble and transmit the record. [A single record shall be transmitted. The record shall be transmitted to the appellate clerk within 60 days from the filing of the notice of appeal provided that timely ordered transcripts, completed after the record has been transmitted to the appellate clerk, shall be filed with the clerk of the court from which the appeal is taken and the clerk of the court shall transmit them to the appellate clerk as a supplemental record without further order of the court or agency or the appellate court. If the record cannot be transmitted within such a period, the supreme court for good cause may extend the time upon stipulation or motion. When the record is not filed within the time required, the appellate clerk shall give notice to counsel for the appellant or to the appellant when he or she is pro se, that the matter will be called to the attention of the appellate court on a day certain for such action as the appellate court deems proper, and the appeal may be dismissed.]
- [(b) Duty of Reporter to Prepare and File Transcript; Notice to Supreme Court; Duty of Clerk to Prepare Indexes and Transmit the Record. Upon receipt of a request for a transcript, the reporter shall time stamp or otherwise acknowledge the date of receipt on the request, indicate the expected completion date on the request, and then transmit a copy of the request to the clerk of the appellate

court and counsel for all parties or the parties themselves, if pro se. If the transcript cannot be completed within 45 days after the filing of the notice of appeal, the reporter shall notify counsel for all parties, or the parties themselves, if pro se, of the new date on which the transcript is expected to be completed, provided that the transcript shall be completed within 60 days after the filing of the notice of appeal, unless the reporter obtains an additional extension of time from the supreme court. Any such additional extension shall be granted upon demonstration by the court reporter that good cause for the extension exists. The court reporter shall serve a copy of the extension order upon counsel for all parties or the parties themselves, if pro se. In the event of the failure of the reporter to file the transcript within the time allowed, the supreme court may take appropriate action, including the levying of a sanction against the court reporter. Upon completion of the transcript, the reporter shall file it with the clerk of the court from which the appeal is taken.]

(b) Duty of the Clerk of the Court.

- (1) Unless otherwise provided, the clerk of the court shall, within 60 days from the filing of the notice of appeal, assemble, certify, and transmit to the appellate clerk a single record on appeal. If a complete record cannot be transmitted within such a period, the supreme court, for good cause, may extend the time upon stipulation or motion, provided that timely-ordered transcripts completed after the record has been transmitted to the appellate clerk, and timely-requested findings of fact and conclusions of law entered after the record on appeal has been transmitted to the appellate clerk, shall be transmitted by the clerk of the court as a supplemental record without further order of the supreme court.
- (2) If the notice of appeal is filed without payment of the required fees and the appellant has not obtained an order allowing the appellant to proceed in forma pauperis, the clerk of the court shall not be required to prepare the record on appeal until the

required fees are received or an order allowing the party to proceed in forma pauperis is obtained.

(3) [When the record is complete for the purposes of appeal, the clerk of the court from which the appeal is taken shall certify it and transmit it forthwith to the appellate clerk.] In preparing the record on appeal, [T]the clerk of the court [from which the appeal is taken] shall consecutively number the pages of the court or agency file and shall provide in the file a numbered index of all the pages therein. If any original papers, exhibits, and transcripts filed in the court or agency appealed from are not mentioned in the numbered index, the clerk of the court shall provide an additional index identifying each of them with reasonable definiteness. [The clerk of the court shall provide all parties to the appeal with copies of said indexes. If an index is claimed to be in error, the party claiming it to be so is obligated to pursue appropriate proceedings in the court from which the appeal is taken to correct it. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record shall not be transmitted by the clerk of the court unless he or she is directed to do so by a party or by the appellate clerk. A party must make advance arrangements with the respective clerks for the transportation and receipt of exhibits of unusual bulk or weight.

(c) Duty of the Appellate Clerk.

- (1) Upon the filing of the record on appeal, the appellate clerk shall provide all parties to the appeal with copies of the record index. If an index is claimed to be in error, the party claiming it to be so is obligated to pursue appropriate proceedings in the court from which the appeal is taken to correct it.
- (2) When the record on appeal is not filed within the time required, the appellate clerk shall give notice to counsel for appellant, or to the appellant, if the appellant is pro se, that the matter will be called to the attention of the appellate court on a day certain for such action as the

appellate court deems proper, including dismissal of the appeal.

- Temporary Retention of [(c)] <u>(d)</u> Record in the Court or Agency Appealed From for Use in Preparing Appellate Papers. Notwithstanding the provisions of (a) and (b) of Rule 11, the parties may stipulate, or the court from which the appeal is taken on motion of any party may order, that the clerk of the court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the clerk of the court shall certify to the appellate clerk that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the appellate court may order, the appellant shall, in writing, request the clerk of the court to transmit the record.
- [(d)] (e) Retention of the Record in the Court or Agency Appealed From by Order of the Appellate Court. The supreme court may order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the court or agency appealed from for its use pending appeal, the court or agency may make an order to that effect, and the clerk of the court shall retain the record or parts thereof subject to the request of the supreme court and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the court or agency shall allow and copies of such parts as the parties may designate.

[(e)] <u>(f)</u> Stipulation of Parties that Parts of the Record be Retained in the Court or Agency Appealed From. The parties may agree by written stipulation filed in the court or agency appealed from that designated parts of the record shall be retained by the

court or agency unless thereafter the appellate court before which the case is pending, or any party, shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

[(f)] (g) Record for Preliminary
Hearing in the Appellate Courts. If any party
desires to make a motion for any intermediate
order in the appellate courts before the
record is transmitted, the clerk of the court
from which the appeal is taken shall transmit
to the appellate clerk such parts of the
original record as any party shall request
and designate in writing.

This rule applies to all motions for intermediate orders including motions for dismissal, for release, for a stay pending appeal, for injunctive relief, or for additional security on the bond on appeal or a supersedeas bond.

5. Rule 24 of the Hawai'i Rules of Appellate Procedure is amended by adding subsection titles for ease of reference, as follows:

Leave to Proceed on Appeal In Forma

Rule 24. PROCEEDINGS IN FORMA PAUPERIS.

Pauperis From the Circuit, District, Family,

Land or Tax Appeal Court or From an Agency Determination to the Hawaii Appellate Courts. A party to an action in the circuit, district, family, land or tax appeal court, or before an administrative agency who desires to proceed on appeal in forma pauperis shall file in the court or agency a motion for leave to so proceed, together with an affidavit or declaration, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay the required filing fees or to give security for costs, the party's belief that he or she is entitled to redress, and a statement of the issues that the party intends to present on appeal. A party who has filed such a motion may file his or her notice of appeal without being required to prepay the filing fees. If the motion is granted, the party may proceed

without further application to the appellate

courts and without prepayment of fees or costs in any court or agency or the giving of security therefor. If the motion is denied, the court or agency appealed from shall state in writing the reasons for the denial. The court or agency appealed from shall promptly provide the appellate clerk with a filed copy of its order granting or denying the motion.

- (b) Effect of prior leave to proceed in forma pauperis. Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in a court or agency in forma pauperis, or who has been permitted to proceed as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in the same action in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the court or agency shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the court or agency shall state in writing the reasons for such certification or finding.
- (c) Motion for leave to proceed in forma pauperis before the supreme court. If a motion for leave to proceed on appeal in forma pauperis is denied by the court or agency, or if the court or agency certifies that the appeal is not taken in good faith or finds that the party is otherwise not entitled to proceed in forma pauperis, the clerk of the court shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the supreme court within 10 days after service of the notice of the action of the court or agency. The motion shall be accompanied by a copy of the affidavit or declaration filed in the court or agency, or by the affidavit or declaration prescribed in the first paragraph of this subsection if no affidavit or declaration has been filed in the court or agency, and by a copy of the statement of reasons given by the court or agency for its action.
- (d) Effect of denial of motion for leave to proceed in forma pauperis. If the court or agency has denied a party the

authority to proceed on appeal in forma pauperis, then within 10 days after the denial of such a motion filed in the supreme court or, if no such motion is filed in the supreme court, within 10 days after the expiration of the time to file such a motion in the supreme court, the movant shall pay all unpaid filing fees and shall give security for costs. Failure of the unsuccessful movant to pay the unpaid filing fees or to give security for costs shall not affect the validity of the appeal, but is ground for such action as the appellate court having jurisdiction over the appeal deems appropriate, which may include dismissal of the appeal.

6. Subsection (a) of Rule 28 of the Hawai'i Rules of Appellate Procedure is amended as follows:

Rule 28. BRIEFS.

(a) Format, Service and Page
Limitation. All briefs shall conform with
Rule 32 and be accompanied by proof of
service of two copies on each party to the
appeal. Except after leave granted, an
opening or answering brief shall not exceed
35 pages, and a reply brief shall not exceed
10 pages, exclusive of indexes, appendices,
and statements of related cases. If a brief
raises ineffective assistance of counsel as a
point of error, the appellant shall serve a
copy of the brief on the attorney alleged to
have been ineffective.

. . .

7. Subsection (b) of Rule 32 of the Hawai'i Rules of Appellate Procedure is amended as follows:

Rule 32. FORM OF PAPERS.

* * *

(b) Quality and Style of Print. If typed, [T] the print must be standard 12 point pica or equivalent and yield no more than [ten] 14 characters to the inch. If printed, whether in proportional or non-proportional fonts, the print must yield no more than 14 characters to the inch. [In f] Footnotes and quotations shall be typed or printed in the

same font and size as the text. Twelve point Times New Roman, Courier New, or Arial fonts will be deemed to satisfy the requirements of this rule. [, pica type at no more than 12 characters per inch may be used.] No attempt shall be made to reduce or condense the print in a manner that would increase the content of the document. All print, including all copies, shall be clear and legible and the lines double spaced or one and one-half spaced except in headings, quotations, citations, indexes, footnotes, and appendices.

. . .

8. Rule 39 of the Hawai'i Rules of Appellate Procedure is amended as follows:

Rule 39. COSTS AND ATTORNEY'S FEES.

(a) Civil Costs; To Whom Allowed.

Except in criminal cases or as otherwise provided by law, if an appeal or petition is dismissed, costs shall be taxed against the appellant or petitioner upon proper application unless otherwise agreed by the parties or ordered by the appellate court; if a judgment is affirmed or a petition denied, costs shall be taxed against the appellant or petitioner unless otherwise ordered; if a judgment is reversed or a petition granted, costs shall be taxed against the appellee or the respondent unless otherwise ordered; if a judgment is affirmed in part and reversed in part, or is vacated, or a petition granted in part and denied in part, the costs shall be allowed only as ordered by the appellate court. If the side against whom costs are assessed has multiple parties, the appellate court may apportion the assessment or impose it jointly and severally.

(b) Costs For and Against the State of Hawai'i. In cases involving the State of Hawai'i or an agency or officer thereof, if an award of costs against the State is authorized by law, costs shall be awarded in accordance with the provisions of this rule; otherwise costs shall not be awarded for or against the State of Hawai'i, its agencies, or its officers acting in their official capacities.

(c) Costs Defined. Costs in the appellate courts are defined as: (1) the cost of the original and one copy of the reporter's transcripts if necessary for the determination of the appeal; (2) the premiums paid for supersedeas bonds or other bonds to preserve rights pending appeal; (3) the fee for filing the appeal; (4) the cost of printing or otherwise producing necessary copies of briefs and appendices, provided that copying costs shall not exceed 20¢ per page; and (5) any other costs authorized by statute or rule.

(d) [Bill of Costs] Request for Fees and Costs; Objections.

- (1) A party who desires an award of attorney's fees or costs shall [state] request them [in] by submitting an itemized and verified bill of fees or costs, together with a statement of authority for each category of items[,]. Requests for indigent fees and costs shall be submitted in a form that substantially complies with Form 7 in the Appendix of Forms. Requests for nonindigent attorney's fees and costs allowed by statute or contract shall be submitted in a form that substantially complies with Form 8 in the Appendix of Forms.
- (2) A request for fees and costs must be filed with the appellate clerk, with proof of service, no later than 14 days after entry of judgment. An untimely request for fees and costs may be denied. Attorneys appointed to represent indigent persons may submit a request for attorney's fees and costs, as provided by statute, after the case has been assigned to either the supreme court or the intermediate court of appeals. Requests for fees and costs by counsel appointed to represent indigent persons may be held in abeyance until resolution of the case on the merits. If oral argument is had or additional work is performed thereafter, the attorney may submit a request for additional fees and costs.
- (3) Objections to [the bill of] requests for fees and costs must be filed with the appellate clerk, with proof of service, within 10 days after service on the party against whom the fees and costs are to

be taxed unless the time is extended by the appellate court. A reply to the objections must be filed with the appellate clerk, with proof of service, within 7 days after service of the objections on the initiating party.

9. Subsection (b) of Rule 42 of the Hawai'i Rules of Appellate Procedure is amended as follows:

Rule 42. DISMISSAL.

- (b) Dismissal in the Appellate Courts. If the parties to a docketed appeal or other proceeding sign and file a stipulation for dismissal, specifying the terms as to payment of costs, and pay whatever fees are due, the case shall be dismissed upon approval of the appellate court, but no mandate or other process shall issue without an order of the court. Upon motion and notice, the appellate court may dismiss the appeal upon terms fixed by the appellate court.
- 10. Rule 53 of the Hawai'i Rules of Appellate Procedure is deleted as follows:

Rule 53. <u>RESERVED.</u> [REQUESTS FOR ATTORNEYS' FEES AND EXPENSES.

- Indigent Representation. Attorneys appointed to represent indigents may submit a request for attorneys' fees and expenses, as provided by statute, after the case is assigned to either the supreme court or the intermediate court of appeals. Requests for indigents fees and expenses may be held in abeyance until resolution of the case on the merits. If oral argument is had or additional work is performed thereafter, the attorney may submit a request for additional fees. Requests for indigent fees and expenses shall be submitted in a form that substantially complies with Form 7 in the Appendix of Forms and no later than 14 days after entry of judgment.
- (b) Non-Indigent Representation.

 Parties claiming attorneys' fees pursuant to statute or contract may submit requests for the fees no later than 14 days after entry of judgment. A request for fees pursuant to statute or contract shall be submitted in a

form that substantially complies with Form 8 in the Appendix of Forms. Objections and replies may be submitted in the manner and within the times provided by Rule 39(d).]

DATED: Honolulu, Hawai'i, October 6, 2003.